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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1939

No. 41

C. E. STEVENS COMPANY (a corporation); C. E. STEVENS TACOMA COMPANY (a corporation); and C. E. STEVENS COMPANY OF OREGON (a corporation),

Petitioners,

vs.

FOSTER & KLEISER CO. (a corporation); GEORGE W. KLEISER; WALTER P. FOSTER; AUGUST F. LAUSEN, JR.; ALBERT MORTENSON; GILMAN HAYNES; RESTOP REALTY CO. (a corporation); GERALD O'NEIL; LYLE ABRAHAMSON; PAUL DUEBER; WALTER STEVENS and GEORGE SMITH,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1939

No. 867

C. E. STEVENS COMPANY (a corporation); C. E. STEVENS TACOMA COMPANY (a corporation); and C. E. STEVENS COMPANY OF OREGON (a corporation),

Petitioners,

vs.

FOSTER & KLEISER CO. (a corporation); GEORGE W. KLEISER; WALTER P. FOSTER; AUGUST F. LAUSEN, JR.; ALBERT MORTENSON; GILMAN HAYNES; RESTOP REALTY CO. (a corporation); GERALD O'NEIL; LYLE ABRAHAMSON; PAUL DUEBER; WALTER STEVENS and GEORGE SMITH,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

This is an action brought by petitioners (plaintiffs below) under Section 7 of the Sherman Act (July 2, 1890, Chap. 647, 26 Stat. 210, U.S.C., Title 15, sec. 15) praying for treble damages claimed to have been caused by an alleged conspiracy on the part of the respondents to monopolize the outdoor advertising business on the Pacific Coast.

The action was filed in the District Court of the United States for the Western District of Washington, Northern Division, on February 27, 1933. While the case was pending there, the petitioners filed three complaints, all of which the District Court held to be bad for one reason or another. On April 26, 1939, the District Court entered a judgment of dismissal after sustaining respondents' demurrer to petitioners' second amended complaint. Petitioners thereupon appealed to the Circuit Court of Appeals for the Ninth Circuit, which affirmed the judgment of dismissal. (*C. E. Stevens Co. et al. v. Foster & Kleiser Co. et al.* (9 Cir., 1940), 109 F. (2d) 764.)[1] The petition seeks a review of the decision of the Circuit Court of Appeals.

Respondents are opposed to the granting of the petition for several reasons, the principal one being that the decision of the Circuit Court of Appeals involves, in the last analysis, the question of whether the allegations of petitioners' second amended complaint are *sufficiently definite* to constitute a good pleading.

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1. The official report of the decision is still in advance sheet form and we therefore make our references to the Opinion of the Circuit Court of Appeals as printed in the Transcript of Record, pp. 81-97.

During the seven years while the case was pending below, the petitioners should have been able to frame a cause of action in accordance with the rules of good pleading. Yet, the second amended complaint in the case at bar is forty-eight pages in length (R. 2-49), is almost wholly devoted to an argumentative statement of petitioners' theory of the case, and is replete with conclusions of law. On the vital issue of whether petitioners sustained injury to their business or property by acts committed in furtherance of the alleged conspiracy to restrain commerce in posters, they have resorted to mere general and sweeping charges of obstruction to the business of independents generally.

Under these circumstances, petitioners are not entitled to a further review of their complaint. Whether the Circuit Court of Appeals for the Ninth Circuit correctly decided that the pleading is too indefinite upon vital matters is not a question of such importance as to require a review by this Court.[2]

The reasons advanced by petitioners for an allowance of the writ are based upon an incorrect statement of the facts. Therefore, we present a brief statement of the substance of their second amended complaint, and the reasons given by the Circuit Court of Appeals for its decision affirming the District Court's judgment of dismissal.

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2. See Rule 38, subd. 5, Revised Rules of the Supreme Court of the United States.

Summary of petitioners' second amended complaint.

The claim presented by petitioners' second amended complaint may be summarized as follows:

Petitioners and respondent Foster and Kleiser Company are competitors engaged in the billboard business on the Pacific Coast. (R. 3, 4, 6.) The business of the parties consists of posting and painting advertisements on billboards and of soliciting and entering into contracts for the performance of billboard services. (R. 4-11.) In the course of their business the parties use posters, designs and other materials which reach the Pacific Coast states through the channels of interstate commerce. (R. 5-12.) The parties, however, had nothing to do with the shipment of posters or other materials in interstate commerce but received them from the advertiser or the lithographer; after which the posters were displayed on billboards in accordance with the posting contracts. (R. 17.)

In an attempt to show that posting contracts are interstate transactions, the petitioners have alleged that posting contracts are agreements to ship posters in interstate commerce. (R. 4.) Such allegations, however, are to be disregarded because, if not conclusions, they are, at the very least, controlled[3] or neu-

3. The rule of pleading that specific allegations control inconsistent general allegations is elementary.
Foster & Kleiser Co. v. Special Site Sign Co. (9 Cir., 1936), 85 F. (2d) 742, at p. 745 (certiorari denied, 299 U.S. 613);
Hayes-Young Tie Plate Co. v. St. Louis Transit Co. (8 Cir., 1905), 137 Fed. 80, at p. 85.

tralized[4] by the more specific and inconsistent allegations appearing elsewhere in the complaint that the contract for posting to which the billboard operator is a party is entirely different from the agreement between the advertiser and lithographer for the manufacture and shipment of posters. (R. 17.) Furthermore, where allegations of a pleading are inconsistent or contradictory, the pleader is bound by those most favorable to his opponents.[5]

It is claimed that in 1915, respondent Foster and Kleiser Company entered into a conspiracy to monopolize the billboard business on the Pacific Coast (R. 18-19) by controlling advertising agencies, preventing the interstate shipment of posters to independent plants and to advertisers dealing with independent plants, and by predatory acts committed against competitive billboard locations. (R. 20.)

Respondents are alleged to have furthered the conspiracy by committing acts which may be summarized as follows:

1. Threats and refusals by and through associations in which respondent Foster and Kleiser Company held memberships to post lithographs in cases where lithographers and advertisers dealt with inde-

4. Inconsistent, repugnant or contradictory averments of matters of substance neutralize each other and render the pleading defective on demurrer.
49 *Corpus Juris*, p. 99;
Ryland v. Hollinger et al. (8 Cir., 1902), 117 Fed. 216, at p. 219;
Sternberg v. Wakonda Drainage and Levee District (7 Cir., 1929), 33 F. (2d) 451, at p. 452.

5. 49 *Corpus Juris*, p. 119;
Wannamaker v. Edisto Nat. Bank of Orangeburg (4 Cir., 1933), 62 F. (2d) 696;
Ryland v. Hollinger et al. (8 Cir., 1902), 117 Fed. 216;
Johnson v. Steele (Ore., 1936), 59 Pac. (2d) 237, at p. 243; 154 Or. 137.

pendents. It is indefinitely claimed that this resulted in general obstruction to the business of independents. (R. 21-26.)

2. A tie-up between respondent Foster and Kleiser Company and General Outdoor Advertising Company whereby Foster and Kleiser Company secured all national advertising posting contracts to be executed on the Pacific Coast. (R. 26-36.) There is no allegation, however, that these national advertising posting contracts were secured by Foster and Kleiser Company by placing any direct restraints upon interstate commerce in posters.

3. Local predatory acts which prevented competitors of respondent Foster and Kleiser Company from securing billboard locations and posting contracts. (R. 36-44.)

As the result of these acts, respondent Foster and Kleiser Company (so it is claimed) acquired 90% of the billboard business on the Pacific Coast.

In so far as the second amended complaint is definite and specific on the issue of damages, it appears that all the damages sustained by petitioners were caused by inability to secure posting contracts and billboard locations—none is specifically alleged to have been caused by any acts furthering the alleged conspiracy to prevent competitors from receiving posters in interstate commerce.

Summary of reasons given by Circuit Court of Appeals for its decision affirming the District Court's judgment of dismissal.

In affirming the judgment of dismissal, the Circuit Court of Appeals conceded, at the outset, that the second amended complaint pleaded a conspiracy to prevent competitors from obtaining posters in interstate commerce and that such a conspiracy was in violation of the Sherman Act. (R. 86-87.) The Court held, however, that the petitioners did not show with the definiteness and clearness required by the rules of good pleading wherein they were injured by any acts committed in furtherance of the unlawful conspiracy. General indefinite allegations of obstruction to the business of independents generally were held to be insufficient. (R. 87-88.)

The specific allegations of injury (said the Court) showed that petitioners' damages were caused by acts which had no direct or immediate restraint upon interstate commerce; and, in view of the primary aim of the monopoly, were not committed in furtherance of any purpose to restrain interstate trade or commerce. It was conceded that the Sherman Act can be violated by imposing a direct restraint upon interstate commerce, even though the primary object of the conspiracy is to monopolize a local business, and the Court made it clear that it did not mean to announce a different rule. (R. 89-90.) However, since the pleading did not definitely and clearly show damages caused by the unlawful conspiracy, and, on the contrary, did definitely show that all the damages sustained by

petitioners were caused by acts not prohibited by the Sherman Act, the pleading was held to be fatally defective on demurrer.

Litigants seeking damages under the Sherman Act cannot succeed by the device of pleading a conspiracy to restrain interstate commerce in cases where their damages are caused by acts which did not directly restrain interstate commerce, and were not intended to restrain interstate commerce. (R. 90.)

It was the theory of the petitioners in the Court below, as it is here, that the outdoor advertising business is *per se* interstate commerce, and that a monopoly thereof is, *ipso facto,* a violation of the Sherman Act. This claim was rejected by the Circuit Court of Appeals (R. 93) on the authority of *Foster & Kleiser Co. v. Special Site Sign Co.* (9 Cir., 1936), 85 F. (2d) 742 (certiorari denied, 299 U. S. 613).

The Court found it unnecessary to determine the correctness of petitioners' claim that the scope of the Sherman Act has been expanded by recent decisions of this Court arising under the National Labor Relations Act. (R. 93-96.)

No abuse of discretion was found in the District Court's refusal of further leave to amend. (R. 96-97.)

We next consider the reasons why this Court should deny the petition to review the decision just summarized.

ARGUMENT.

Summary.

The decision of the Circuit Court of Appeals involves primarily the question whether petitioners' pleading was sufficiently definite on the issue of damages. *This in itself is a complete answer to the petition because a question of definiteness in the form of pleading is not of sufficient importance to require review by this Court.*

The record presents only one of the questions stated in the petition,[6] i. e., whether the business of posting lithographs on billboards and entering into contracts with advertisers for the performance of such service is interstate commerce *per se,* so that a monopoly of such business is in restraint of interstate trade and commerce in violation of the Sherman Act. This question was decided by the Circuit Court of Appeals in conformity with previous decisions of this Court on the same general subject, and does not require further review here.

I. THE PETITION SHOULD BE DENIED BECAUSE IT SEEKS A REVIEW OF A DECISION WHICH IS BASED PRIMARILY UPON PETITIONERS' FAILURE TO CONFORM WITH AN ELEMENTARY RULE OF PLEADING, VIZ., THAT IN AN ACTION FOR DAMAGES UNDER THE SHERMAN ACT THE PLAINTIFF MUST PLEAD WITH DEFINITENESS FACTS SHOWING WHEREIN HE WAS INJURED BY A VIOLATION OF THE ACT.

An analysis of the opinion of the Circuit Court of Appeals discloses that its decision rests primarily

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6. The only question stated in the petition which is presented by the record is question 3, at pp. 8-9 of the petition.

upon the failure of petitioners to plead definitely facts as distinguished from conclusions showing wherein they were injured by the alleged conspiracy to restrain interstate trade and commerce in posters.

The Circuit Court of Appeals conceded that a violation of the Sherman Act had been pleaded.

Whether the petitioners have pleaded a conspiracy to restrain interstate trade and commerce in posters and lithographs is not at issue. A conspiracy to restrain such commerce is alleged in paragraphs VII and VIII of petitioners' second amended complaint. (R. 19-20.) We conceded below, as we do here, that petitioners have pleaded a conspiracy to restrain interstate commerce; and the Circuit Court of Appeals quoted and adopted our concession in its opinion. (R. 87.)

The Circuit Court of Appeals based its decision primarily upon the ground that petitioners' pleading of an unlawful conspiracy was not enough because in an action for damages under the Sherman Act plaintiff must definitely plead facts showing wherein he was injured by acts committed in furtherance of the conspiracy.

The unlawful conspiracy alleged by petitioners was a scheme to prevent independent billposters from securing lithographs and posters in interstate commerce for the purpose of preventing the independent billposters from carrying on their local business of billposting. Although the ultimate purpose of the

conspirators was to restrain a local business, nevertheless such a scheme would clearly violate the Sherman Act.

Ramsay Co. v. Bill Posters Assn. (1923), 260 U. S. 501; 43 S. Ct. 167; 67 L. Ed. 368.

However, the petitioners failed to plead the commission of any overt acts in furtherance of this conspiracy except in paragraph X of their second amended complaint (R. 21-26), wherein it is alleged that the conspirators by and through action of the Association made threats and refusals to post lithographs[7] in cases where lithographers and advertisers dealt with independents. It is claimed that *independents* were thereby obstructed and hindered in their business. (R. 23, 26.)

The Circuit Court of Appeals had no alternative but to hold that such allegations were not sufficiently definite to show that petitioners were injured in their business and property by acts committed in furtherance of the alleged conspiracy. As the Circuit Court of Appeals stated in its opinion (R. 88):

> "This is not a definite allegation that appellants were unable to obtain posters or lithographs with which to execute their advertising contracts because of the activities of appellees or that advertisers seeking to deal with appellants were unable to secure posters for posting by appellants. If

7. The conspirators themselves are not alleged to have made these threats. The Association is not alleged to be in the business of posting or in the business of buying or selling posters. The Association is not named as a conspirator. *There is nothing in the record to support the statement at p. 4 of the petition that the Association refuses to buy posters or lithographs from lithographers who sell posters and lithographs for display on independent display plants.*

that was in fact the case, appellants should have alleged it to be so, definitely and clearly. * * *"

In holding that an indefinite sweeping allegation of obstruction to the business of independents generally is insufficient, the Circuit Court of Appeals was applying an elementary principle of pleading. It is well settled that in cases of this character such allegations must be disregarded on demurrer and cannot be considered in determining whether the petitioners have stated a cause of action.[8]

The case which petitioners have attempted to make out in their petition and supporting brief, and the argument which Justice Haney advanced in his dissenting opinion are based upon conclusions of law that the activities of respondents unreasonably restrained interstate commerce in posters. Such conclusions of law must be disregarded.[9]

Disregarding the conclusions of law and the indefinite allegations of obstruction to the business of independents generally, there is nothing in the pleading which shows a direct restraint upon the interstate

8. *Shurtz v. Foster & Kleiser Co. et al.* (1939), 29 Fed. Supp. 162, at p. 164;
Ebeling v. Foster & Kleiser Co. (D.C., W.D., Wash., N.D., 1935), 12 Fed. Supp. 489, at p. 490;
Alexander Milburn Co. v. Union Carbide & Carbon Corp. (4 Cir., 1926), 15 F. (2d) 678, at p. 680;
Gerli v. Silk Assn. of America (D.C., S. D., New York, 1929), 36 F. (2d) 959, at p. 960.

9. *Foster & Kleiser Co. v. Special Site Sign Co.* (9 Cir., 1936), 85 F. (2d) 742, at pp. 745, 753 (certiorari denied, 299 U.S. 613);
Glenn Coal Co. v. Dickinson Fuel Co. (4 Cir., 1934), 72 F. (2d) 885, at p. 888;
Lipson v. Socony-Vacuum Corp. (D.C., D. Mass., 1934), 7 Fed. Supp. 961, at p. 964;
Alexander Milburn Co. v. Union Carbide & Carbon Corp. (4 Cir., 1926), 15 F. (2d) 678, at p. 680;
Witherell & Dobbins Co. v. United Machinery Co. (1 Cir., 1920), 267 Fed. 950, at pp. 955, 956.

shipment of posters to the injury of petitioners. The business of posting lithographs on billboards and contracting for the performance of such service is a local business. The specific allegations of the complaint show that any injury to petitioners was caused by acts directed against these local transactions; and that such acts did not have, and were not intended to have, any direct or immediate effect upon interstate commerce in posters. As stated by the Court (R. 88):

> "* * * An analysis of the complaint as a whole shows that the alleged damage to appellants flowed not from inability of appellants to obtain posters but from inability to obtain advertising contracts and billboard sites upon which to execute the same."

The question of whether a complaint is sufficiently definite to conform with the rules of good pleading is not of sufficient importance to require review by this Court.

This is not a matter which requires further review. Petitioners have filed three complaints in the District Court and had ample opportunity there to place their pleading in proper form. They had the benefit of the opinion of the Circuit Court of Appeals in its review of a parallel case in the same circuit (*Foster & Kleiser Co. v. Special Site Sign Co.* (9 Cir., 1936), 85 F. (2d) 742; certiorari denied 299 U. S. 613) before they filed their last complaint. Finally, they have had a full and complete appellate review of this case by the Circuit Court of Appeals. Since the basic question involved in the decision of the Circuit Court of Appeals is whether petitioners have definitely pleaded

facts showing wherein they were injured by a violation of the Sherman Act, there appears to be no special or important reason to review the matter on a writ of certiorari. (Revised Rules of the Supreme Court of the United States, Rule 38, subd. 5.)

II. THE PETITION SHOULD BE DENIED BECAUSE THE RECORD DOES NOT PRESENT THREE OF THE FOUR QUESTIONS STATED IN THE PETITION, AND THE REMAINING QUESTION WAS DECIDED BELOW IN ACCORDANCE WITH WELL SETTLED DECISIONS OF THIS COURT ON THE SAME GENERAL SUBJECT.

The petition states four questions which are asserted to be presented by the decision of the Circuit Court of Appeals. (Petition, pp. 8-9.) Only one of these four questions is presented by the record, i. e., whether the outdoor advertising business is *per se* interstate commerce. The other three questions are not presented by the record, as the Circuit Court of Appeals did not make the statements on which they are based.

The first question stated by petitioners at page 8 of the petition is not presented by the record because the Circuit Court of Appeals did not hold, as petitioners contend, that the main object of the conspirators being to monopolize the intrastate aspects of the business, the intent to accomplish that purpose by restraining interstate commerce is not within the scope of the Sherman Act.

Petitioners' main attack against the decision of the Circuit Court of Appeals is grounded upon the asser-

tion that the decision announced a new and erroneous doctrine,—the doctrine that since the ultimate object of the conspirators was to control transactions local in character, there was no violation of the Sherman Act, even though the conspirators intended to accomplish their main object by preventing posters from reaching competitors through the channels of interstate commerce. The first question stated in the petition assumes that such an erroneous doctrine was announced.

The Circuit Court of Appeals neither stated nor held that where the main purpose of the conspirators is to control local transactions, an accomplishment of that purpose by placing direct restraints on interstate commerce is outside the scope of the Sherman Act. On the contrary, the Circuit Court of Appeals expressly disavowed the announcement of any such doctrine, and, in this connection, made the following statement in its opinion (R. 89-90):

> "We do not hold that because the ultimate object of a conspiracy is to obtain a monopoly of intrastate business or commerce such an object can be brought about by a restraint of interstate commerce without violating the Sherman Anti-Trust law. This is not the law. See, Bedford Cut Stone Co. v. Journeymen S.C. Ass'n., 274 U. S. 37, 47."

The Circuit Court of Appeals did hold, and correctly so, that petitioners' damages are not shown by their pleading to have been caused by acts committed in furtherance of the alleged conspiracy to prevent competitors from obtaining posters in interstate com-

merce; and that the acts which are shown to have damaged petitioners were directed, not against control of the poster trade, but rather, against local activities.

Of course, if the local acts which caused petitioners' injury did directly and immediately restrain interstate commerce in posters, petitioners would have been entitled to recover damages caused by such acts, regardless of the ultimate object of the conspirators. The Court did not announce any rule to the contrary. However, there is no showing in the second amended complaint, except by conclusions of law which must be disregarded, that interstate commerce in posters was directly restrained by preventing the acquisition and use of billboards and by obtaining a monopoly of posting contracts,—activities intrastate in character.

Petitioners have missed the whole point of the decision below concerning the significance of the conspirators' primary intent to restrain only local activities. The observations of the Circuit Court of Appeals upon this subject were thought to be necessary only because this Court has so often announced[10] the rule that acts which apparently have no direct and immediate restraint upon interstate commerce are nevertheless in direct violation of the Sherman Act if they are committed for the purpose of thereby restraining or controlling interstate commerce. After

10. *Bedford Cut Stone Co. v. Journeymen Stone Cutters Assn.* (1927), 274 U. S. 37; 47 S. Ct. 522; 71 L. Ed. 916;
Coronado Coal Company v. United Mine Workers of America (1925), 268 U. S. 295; 45 S. Ct. 551; 69 L. Ed. 963;
Loewe v. Lawlor (1908), 208 U. S. 274; 28 S. Ct. 301; 52 L. Ed. 488; at p. 502.

See also:
Schechter Corp. v. United States (1935), 295 U. S. 495, at p. 547; 55 S. Ct. 837; 79 L. Ed. 1570.

reviewing the decisions of this Court upon that subject, the Circuit Court of Appeals stated that the complaint at bar shows that the damaging activities of the conspirators were not committed for the purpose of controlling interstate commerce in posters. It was in this connection that the Court made the following statement, which petitioners criticize. (R. 92-93):

> "* * * In all these cases it is held that when acts intrastate in character are relied upon to bring a case within the scope of the Sherman Anti-Trust Act, supra, such acts must be done with the primary intention of monopolizing or burdening the free movement of goods in interstate commerce. As we have stated, it is clear from a reading of the complaint as a whole that the purpose of the conspiracy alleged was not a monopoly of the outdoor advertising business in its interstate aspects, that is, the control of poster or lithograph trade but, rather, the control of the local business of securing advertising contracts and billposting."

This is not a holding, nor did the Circuit Court of Appeals anywhere state in its opinion, that damages caused by acts which directly restrained interstate commerce in posters are not recoverable where the whole purpose of the conspirators is to control the local business of securing advertising contracts and billposting.

In discussing this question in their supporting brief, petitioners suggest that a direct restraint upon the interstate transportation of posters is alleged because (so they claim) posting contracts are agreements to

ship posters in interstate commerce and a monopoly thereof by eastern tie-ups is *per se* a violation of the Sherman Act. This argument, however, is based upon a misstatement of the allegations of their second amended complaint, as the specific allegations of the complaint show definitely that the billposter has nothing to do with the interstate shipment of posters. Any conclusions of law or general allegations to the contrary are controlled or neutralized by such specific allegations.[11]

The second question raised by petitioners at page 8 of their petition is not presented by the record because the Circuit Court of Appeals did not hold, as petitioners contend, "that the complaint failed to allege with sufficient definiteness and clearness that petitioners by reason of the primary aim of the monopoly were unable to secure posters or lithographs with which to execute their advertising contracts or that advertisers seeking to deal with petitioners were unable to secure posters for posting by petitioners."

The Circuit Court of Appeals held, it is true, that petitioners did not definitely and clearly allege in their pleading that they were unable to secure posters or lithographs or that advertisers seeking to deal with petitioners were unable to secure posters to be posted by petitioners. However, the Court did not, as petitioners contend, base that holding on the primary aim of the monopoly.

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11. See footnotes 3 and 4 at pp. 4-5 of this brief.

Obviously, the primary aim of the monopoly has no relation to the question of whether the petitioners definitely pleaded an inability to secure posters. If petitioners were unable to obtain posters by reason of the conspiracy and had definitely pleaded that fact, the primary aim of the monopoly could not render indefinite a pleading otherwise definite. There is nothing in the Court's opinion to the effect that the primary aim of the monopoly is to be considered in determining whether or not a pleading of injury is definite.

The Court's observations on the primary aim of monopoly were *not made* upon the issue of whether the pleading was definite on the subject of damages; but, on the contrary, the Court made these observations in considering whether the *definite allegations of injury* were caused by acts prohibited by the Sherman Act. The Court held that the *definite allegations of injury* show damages caused by acts which have no direct or immediate restraint upon interstate commerce, and, in view of the primary aim of the monopoly, were not committed in furtherance of any purpose to restrain interstate trade or commerce. Since the pleading did not definitely and clearly show damages caused by the unlawful conspiracy, and, on the contrary, did definitely show that all the damages sustained by petitioners were caused by acts not prohibited by the Sherman Act, the pleading was held to be fatally defective on demurrer.

Although the third question stated by petitioners at pages 8-9 of the petition is presented by the record, it does not require review by this Court because the decision of the Circuit Court of Appeals that the outdoor advertising business of the parties is not interstate commerce is in accord with well settled decisions of this Court.

Petitioners claim that the outdoor advertising business of the parties is interstate commerce *per se,* so that a monopoly thereof, *ipso facto,* constitutes a violation of the Sherman Act. They ask to have this question reviewed. (Petition, pp. 8-9.)

Although the question is presented by the record, it does not require review here. This Court has already held that the business of the parties as described in the pleading is not interstate commerce.

The second amended complaint shows that the outdoor advertising business consists of painting and posting advertisements on billboards and soliciting and performing contracts for such painting and posting of advertisements. The posting itself is performed with posters, which, assuming them to be articles of commerce, are nevertheless out of the channels of interstate commerce when used by the parties. The posting, therefore, is a local business.

In *Packer Corporation v. Utah* (1932), 285 U. S. 105; 52 S. Ct. 273; 76 L. Ed. 643, this Court said of the outdoor advertising business at page 112:

> "* * * Whatever may be the limitations upon the power of the State to regulate solicitation and advertisement incident to an exclusively interstate

business, the commerce clause interposes no barrier to its effective control of *advertising essentially local.* * * *'' (Emphasis supplied.)

In *Foster & Kleiser Co. v. Special Site Sign Co.* (9 Cir., 1936), 85 F. (2d) 742 (certiorari denied, 299 U.S. 613), the Court said at page 753:

"* * * Therefore, as the outdoor advertising business is not interstate, but is local in character, the theory of the pleader must fail to that extent."

In *General Outdoor Advertising Co. v. Dept. of Public Works* (1925), 193 N.E. 799; 289 Mass. 149, the Court stated at page 811:

"* * * **The outdoor advertising business of the several plaintiffs is intrastate and not interstate business or commerce.** * * *'' (Emphasis supplied.)

The contract for posting is a contract for the performance of a local act, and, hence, is not an interstate transaction. The circumstance that the billposting contracts are made between persons residing in different states does not transform the transaction into an interstate one.

Ware & Leland v. Mobile County (1908), 209 U. S. 405, at p. 413; 28 S. Ct. 526; 52 L. Ed. 855;

Blumenstock Bros. Adv. Agency v. Curtis Pub. Co. (1920), 252 U. S. 436; 40 S. Ct. 385; 64 L. Ed. 649.

The second amended complaint affirmatively shows that the only interstate commerce involved in the billposting business is the interstate shipment of posters,

lithographs, stencils and similar materials; and that shipment of these articles is made to the billposter upon the direction of the advertiser. The shipment is a separate "and different" transaction from the posting contract. (Second Amended Complaint, Par. VI; R. 17.) The local character of the billboard business is not affected by the circumstance that the plant operator uses material shipped to him in interstate commerce. Local business does not become interstate in character because it employs material locally which at one time crossed state lines.

Schechter Corp. v. United States (1935), 295 U. S. 495, at pp. 542-543; 55 S. Ct. 837; 79 L. Ed. 1570.

Since the business of soliciting, entering into, and performing posting contracts is local and not interstate, a monopoly of the business is not a monopoly of interstate commerce, and damages caused by such monopoly are not recoverable. *Ramsay Co. v. Bill Posters Assn.* (1923), 260 U. S. 501; 43 S. Ct. 167; 67 L. Ed. 368, relied upon by petitioners, is distinguishable because in that case the plaintiffs prepared, designed, purchased and sold posters in interstate commerce and thus were engaged in interstate commerce. Furthermore, the plaintiffs' damages in the *Ramsay* case were caused by an attempt or conspiracy to monopolize the local business in billposting by restraining the interstate shipment of posters, whereas in the complaint at bar petitioners failed to show definitely any injury of this character.

The fourth question stated by petitioners at page 9 of the petition is not presented by the record because the Circuit Court of Appeals did not hold, as petitioners contend, that the Sherman Act does not apply to intrastate activities which "directly affect interstate commerce".

Petitioners claim that the scope of the Sherman Act has been "expanded" by recent decisions of this Court arising under the National Labor Relations Act so as to cover intrastate activities which "directly affect interstate commerce". They say that the Circuit Court of Appeals held that the Sherman Act does not cover activities which "directly affect interstate commerce", and ask to have the question reviewed.

The question is not presented by the record. Nowhere in the opinion of the Circuit Court of Appeals does any statement appear to the effect that intrastate activities which "directly affect interstate commerce" are not within the Sherman Act. On the contrary, the Court held that interstate commerce in the case at bar was only incidentally affected by the activities complained of and that the Sherman Act does not cover activities which might incidentally affect interstate commerce. We quote from the Court's opinion on this subject (R. 95, Footnote):

> "The Anti-Trust Act does not declare unlawful conspiracies to control local trade which may *incidentally* affect interstate commerce." (Emphasis supplied.)

There is nothing in the Court's decision which can be considered a holding that the Sherman Act does

not apply to intrastate activities which "directly affect interstate commerce". It was the Court's view that since the activities complained of affected interstate commerce only incidentally, and since the Sherman Act does not cover local activities having an incidental effect upon interstate commerce, it was unnecessary to inquire further concerning the constitutional power of the Congress under the commerce clause.

Apart from the fact that there is nothing in the record which presents the question, it is clear that the constitutional power of Congress under the commerce clause and the exercise of that power under the Sherman Act are two separate matters. Unquestionably the Congress has the constitutional power to regulate local activities directly affecting interstate commerce where it is thought that such regulation is necessary to protect interstate commerce from undue burdens. The cases cited at page 35 of petitioners' supporting brief are all to this effect.[12]

Has the Congress undertaken in the Sherman Act to regulate the local acts which are alleged to have caused petitioners' injury in the case at bar? This Court has consistently held that the Sherman Act does not apply to activities which only indirectly and remotely restrain interstate commerce and which are not done for

12. *National Labor Relations Board v. Jones & Laughlin S. Corp.* (1937), 301 U. S. 1; 57 S. Ct. 615; 81 L. Ed. 893;
National Labor Relations Board v. Fainblatt (1939), 306 U. S. 601; 59 S. Ct. 668; 83 L. Ed. 1014;
Santa Cruz Fruit Pack. Co. v. National Labor Relations Board (1938), 303 U. S. 453; 58 S. Ct. 656; 82 L. Ed. 954;
United States v. Rock Royal Co-Operative (1939), 307 U. S. 533; 59 S. Ct. 993; 83 L. Ed. 1446;
Currin v. Wallace (1939), 306 U. S. 1; 59 S. Ct. 379; 83 L. Ed. 441.

the purpose of interfering with interstate commerce.[13] The circumstance that the Congress may have subsequently determined in other legislation to exercise its constitutional power over a broader field of local transactions is of no importance. Therefore, decisions of this Court approving this broader exercise of constitutional power under the National Labor Relations Act obviously have no application to the question of how much power the Congress intended to exercise under the Sherman Act.[14]

It is not necessary for this Court to review the question of whether Foster & Kleiser Co. v. Special Site Sign Co., 85 F. (2d) 742, is controlling in the case at bar.

Although the petition does not present this as a question, nevertheless petitioners assert in their reasons relied upon for the allowance of the writ,[15] in their assignments of error,[16] and in their supporting brief,[17] that *Foster & Kleiser Co. v. Special Site Sign Co.* (9 Cir., 1936), 85 F. (2d) 742 (certiorari denied, 299 U. S. 613) is not controlling.

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13. *United Mine Workers v. Coronado Coal Co.* (1922), 259 U. S. 344, at pp. 410, 411; 42 S. Ct. 570; 66 L. Ed. 975;
United Leather Workers v. Herkert (1924), 265 U. S. 457, at pp. 464-467; 44 S. Ct. 623; 68 L. Ed. 1104;
Industrial Assn. v. United States (1925), 268 U. S. 64, at p. 82; 45 S. Ct. 403; 69 L. Ed. 849;
Levering & G. Co. v. Morrin (1933), 289 U. S. 103, at pp. 107, 108; 53 S. Ct. 549; 77 L. Ed. 1062.

14. *Leader et al. v. Apex Hosiery Co.* (1939), 108 F. (2d) 71, at p. 81 (certiorari granted Feb. 26, 1940);
Wilson & Co. v. Birl et al. (D.C., E.D., Pa., 1939), 27 Fed. Supp. 915;
51 *Harvard Law Review*, pp. 169-170;
39 *Columbia Law Review*, p. 1247.

15. Reason 3, petition pp. 9-10.

16. Assignment II, petitioners' supporting brief, p. 14.

17. Point II of petitioners' argument in supporting brief, pp. 29-32.

Whether the decision in the *Special Site* case is or is not controlling is a question of no importance to this Court. Both decisions were rendered by the same Circuit Court of Appeals, so that there is no question of a conflict of decisions between different circuits on the same matter.

The similarity between the two cases is so adequately presented in the opinion of the Circuit Court of Appeals as to render unnecessary a reply to petitioners' argument that the cases are substantially different.

CONCLUSION.

It is submitted that the petition herein should be denied.

Dated, San Francisco, California,
April 24, 1940.

Respectfully submitted,

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